No. 1276

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

UNITED STATES OF AMERICA, *Appellant*

v.

GEORGE JOSEPH ORITO, *Appellee*

On Appeal From the United States District Court For The Eastern District of Wisconsin

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the decision and order by the district court on October 28, 1970 (Juris. St. 9-14) be summarily affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1462, which prohibits the interstate transportation by common carrier of obscene material, irrespective of its intended use, is unconstitutional because of its overbreadth.

2. Whether appellee had standing to challenge the statute on its face because of its overbreadth.

ARGUMENT

1. Section 1462 of Title 18, United States Code, in relatively clear language, proscribes the importation and transportation of obscene materials through the use of interstate commerce. The specific clause under which the appellee was charged prohibits the sole act of transportation or carriage of allegedly obscene materials. Appellee submits that such an unqualified prohibition of all forms of interstate transportation is patently unconstitutional in light of this Court's decisions in *Redrup v. New York,* 386 U.S. 767, and *Stanley v. Georgia,* 394 U.S. 557. The inescapable implication of those decisions is that conduct such as the transportation of obscene material is protected from governmental interference and criminal punishment.

It is appellee's position that *Stanley v. Georgia, supra,* established significant constitutional distinctions between openly public activity, on the one hand, and private or restricted activity in relation to obscenity, on the other. Given its narrowest interpretation, this Court held in *Stanley* that "mere private possession of obscene matter cannot constitutionally be made a crime." 394 U.S. at 559. However, the opinion further indicates that there is no legitimate governmental interest in regulating the use of obscene materials in most, if not all, private or restricted situations whether or not they involve possession in the home. Specifically, this Court noted that legitimate governmental interests in regulating obscenity come into play only where a danger arises of improper exposure of materials to juveniles or unconsenting members of the public (394 U.S. at 567):

> It is true that in Roth this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of anti-

> social conduct or would probably induce its recipients to such conduct. . . . But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York, supra,* or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York,* 386 U.S. 767, 769, 18 L. ed 2d 515, 517, 87 S. Ct. 1414 (1967). No such dangers are present in this case.

Thus, appellee submits that Section 1462 is patently overbroad and unconstitutional in that it

> does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. [*Thornhill v. Alabama,* 310 U.S. 88, 97]

First of all, Section 1462 is fatally overbroad because it can be applied to situations where the activities of private possession and transportation occur simultaneously. For example, may a person who carries obscene materials in his attaché case aboard a commercial airliner be punished under Section 1462?[1] The United States would have the protections of *Stanley* apply only to situations involving possession in the privacy of one's home. Appellee can only submit that the logic of *Stanley* hardly seems limited to the location of one's home. (Cf., *Katz*

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[1] See *United States v. Thirty-Seven (37) Photographs,* 309 F. Supp. 36 (C.D. Cal. 1970), No. 133, this Term, probable jurisdiction noted, October 12, 1970. There the party involved had carried allegedly obscene photographs in his personal luggage aboard a commercial airliner as he entered the United States. These photographs were subsequently seized by customs officials in the course of an inspection, pursuant to 19 U.S.C. 1305.

v. United States, 389 U.S. 347, 351.) It is appellee's position that this Court was just as concerned, if not more concerned, with the right of persons to receive information regardless of its social worth than with intrusions into the home. Section 1462 fails to exclude from its coverage those situations where the activities of private or personal possession and transportation occur simultaneously. The right to be free from unwanted governmental intrusions upon one's privacy in such situations is not protected as the section is presently constituted.

A second reason for the overbreadth of Section 1462 stems from the failure of the statute to define interstate transportation more precisely in terms of public distribution or commercial dissemination. Given its generally accepted meaning, the mere act of transportation or carriage of obscene materials in interstate commerce is an extremely private activity. The act of transportation itself cannot be said to in any way involve exposure of the materials to juveniles or to unconsenting adults. While *Stanley* indicates that legitimate governmental interests arise at the point of distribution, that does not permit governmental interference or punishment of a different act, i.e., transportation, which is essentially private in nature.[2] The fatal overbreadth of Section 1462 in this regard follows from the imprecise definition of the prohibited activity.

Thirdly, Section 1462 is overbroad because it fails to distinguish between instances of transportation for private or personal reasons and transportation for commercial or public reasons. The *Stanley* decision, at the very

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[2]This interpretation was essentially adopted by lower federal courts in *United States v. 4,400 Copies of Magazines,* 276 F. Supp. 904 (D. Md. 1967); *United States v. 127,295 Copies of Magazines, More or Less Entitled "Amor",* 295 F. Supp. 1186 (D. Md. 1968).

least, draws a constitutional distinction between commercial or public dissemination of obscene materials and non-public or private distribution. Referring to the *Roth* decision this Court stated (394 U.S. at 567): "But that case dealt with public distribution of obscene materials and such distribution is subject to different objections." Earlier in the opinion this Court stated (394 U.S. at 562): "Other cases dealing with non-public distribution of obscene material or with legitimate uses of obscene material have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds." By referring to the various fact situations of non-public distribution and commercial or public distribution, the *Stanley* decision at minimum, implies that interstate shipment or transportation of obscene materials for private, noncommercial purposes is protected activity.[8]

Finally, appellee submits that Section 1462 is also overbroad because it can be applied to instances of transportation of obscene materials for commercial purposes to requesting adults. Protection for this type of activity follows from the explicit reference in *Stanley* to the constitutionally-derived right to receive information and ideas regardless of their social worth. Moreover, this Court stated (394 U.S. at 565-566): "Our whole constitutional heritage rebels at the thought of giving Government the power to control men's minds." Obviously, one of the main concerns in the opinion involved the First Amendment right to obtain information and material even if considered obscene.

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[8]Several lower federal courts have adopted essentially this interpretation. See *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), reversed on other grounds, sub. nom. *Dyson v. Stein*, No. 41, this Term, February 23, 1971; *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y. 1970); *United States v. Dellapia*, No. 34858 (2 Cir., Oct. 20, 1970).

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive. . . ." *Martin v. City of Struthers,* 319 U.S. 141, 143, 87 L. ed 1313, 1316, 63 S. Ct. 862 (1943); see *Griswold v. Connecticut,* 381 U.S. 479, 482, 14 L. ed 2d 510, 513, 85 S. Ct. 1678 (1965); *Lamont v. Postmaster General,* 381 U.S. 301, 307-308, 14 L. ed 2d 398, 402, 403, 85 S. Ct. 1493 (1965) (Brennan, J., concurring); Cf. *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. ed 1070, 45 S. Ct. 571, 39 A.L.R. 468 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters v. New York,* 333 U.S. 507, 510, 92 L. ed 840, 847, 68 S. Ct. 665 (1948), is fundamental to a free society. [394 U.S. at 564.]

Thus, appellee submits that if *Stanley* has firmly established the right to possess obscene material and the correlative right to receive such information regardless of its social worth, then the right to transport or distribute such materials necessarily follows.[4]

While the Government's position apparently would permit private possession of obscene materials in the home, it would nevertheless punish the only means of gaining possession. If *Stanley* has established a protected right of a person to possess materials in the home, the

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[4] Several decisions of this Court have inferred a correlative right of distribution from a right to receive informational material. See *Martin v. City of Struthers,* 319 U.S. 141, 143; *Winters v. New York,* 333 U.S. 507, 510; *Griswold v. Connecticut,* 381 U.S. 479, 482; Cf., *Crane v. Campbell,* 245 U.S. 304.

distributor or supplier must be protected in providing those materials.[5]

2. In its jurisdictional statement the United States challenges the standing of the appellee to attack Section 1462 on its face as overly broad. From the foregoing argument it should be clear that the appellee attacks the statute as overbroad not only because of possible applications in hypothetical situations, but also because of its actual application to the appellee. Appellee was indicted for the sole act of transportation or shipment of obscene materials in interstate commerce, without any allegation that the allegedly obscene materials would be distributed commercially, disseminated to juveniles, or foisted upon the public. Appellee clearly has standing to assert that all transportation is protected activity because of its private nature.

However, appellee also submits that the district court correctly scrutinized possible applications of Section 1462 without regard to the particular constitutional status of the appellee's conduct. See *Thornhill v. Alabama,* 310

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[5]Several lower federal courts, besides the court below, have adopted essentially this interpretation. See *Karalexis v. Byrne,* 306 F. Supp. 1368 (D. Mass. 1969), reversed on other grounds, sub. nom. *Byrne v. Karalexis,* No. 83, this Term, (February 23, 1971); *United States v. Thirty-Seven Photographs, supra; United States v. Lethe,* 312 F. Supp. 421 (E.D. Cal., 1970); *United States v. Langford,* 315 F. Supp. 472 (D. Minn. 1970); *United States v. B & H Dist. Corp.,* 319 F. Supp. 1231 (W.D. Wis. 1970), No. 1383, this Term, 1970, jurisdictional statement filed February 23, 1971; *Hayse v. Van Hoomissen,* 321 F. Supp. 642 (D. Ore., 1970), No. 1387, this Term, appeal docketed February 12, 1971; *United States v. Reidel,* No. 5845-HP-CR (C.D. Cal., June 8, 1970) No. 534, this Term, probable jurisdiction noted, October 12, 1970; *United States v. Thirty-Five MM. Motion Picture Film "Language of Love",* 432 F. 2d 705 (2 Cir. 1970), No. 1009, this Term, certiorari granted February 22, 1971.

U.S. 88, 98; *Terminiello v. Chicago,* 337 U.S. 1; *Kunz v. New York,* 340 U.S. 290; *N.A.A.C.P. v. Button,* 371 U.S. 415; *Aptheker v. Secretary of State,* 378 U.S. 500; *Dombrowski v. Pfister,* 380 U.S. 479.

CONCLUSION

Appellee submits that the fatal defect in Section 1462 stems from the imprecision of the language contained therein. Clearly, the Government has no substantial or legitimate interest in proscribing all interstate transportation of obscene materials. Appellee has set forth those instances with supporting authority where similar conduct has been found to be protected under the First and Fourteenth Amendments to the United States Constitution. For this reason it is submitted that the action of the Court below was well founded in law, reason and policy and should be summarily affirmed by this Court.

Respectfully submitted,

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